

No. 14,643

IN THE
**United States Court of Appeals
For the Ninth Circuit**

HOWARD HILDEBRANDT,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

This Court has jurisdiction under Sections 2241 and 2253 of Title 28, United States Code.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing a petition for a writ of habeas corpus made and entered December 9, 1954 by United States District Judge Louis E. Goodman.

On December 7, 1954 appellant petitioned for a writ of habeas corpus on the ground that he had not waived a jury trial. He included as Exhibit B of his petition for habeas corpus a copy of the judgment

and commitment under which he is confined. It is recited in the judgment that the defendant was convicted upon his *plea of guilty*. (For a statement of the facts surrounding appellant's plea see *United States v. Hildebrandt* (1953), 113 F.Supp. 577). On April 6, 1953 and September 23, 1953 appellant applied for a motion to vacate under Section 2255 of Title 28 United States Code. On May 20, 1953 and February 12, 1954 the motions were denied. The Court of Appeals for the First Circuit, on November 17, 1954, affirmed the judgment of the District Court. On December 22, 1954 appellant appealed from the judgment of the District Court for the Northern District of California dismissing the petition for a writ of habeas corpus.

OPINION OF THE COURT BELOW.

“ORDER DISMISSING PETITION FOR THE WRIT OF HABEAS CORPUS

“Howard Hildebrandt petitions for the writ of habeas corpus upon the ground that the judgment and sentence under which he is imprisoned is void because he was not accorded a trial by jury, although a jury was not waived. He asserts that this Court has jurisdiction to entertain the petition because his two motions to vacate the sentence, addressed to the trial court pursuant to 28 USC 2255, have proved ineffective to test the legality of his detention.

“The petition for the writ alleges merely that: ‘On April 6, 1953 and September 23, 1953 petitioner

filed motions in the trial Court under Section 2255, in which he claimed among other things that he had been denied a jury trial and that the Court never formally found him guilty. On May 20, 1953 and February 12, 1954, the motions were denied and an appeal was prosecuted to the First Circuit Court of Appeals. On November 17, 1954 the Appellate Court affirmed the lower Court's judgment.'

"Petitioner attaches as an exhibit a copy of the per curiam opinion of the Court of Appeals in which the judgment of the trial court denying the second motion to vacate is affirmed. He does not set forth the contents of his motions to vacate nor the orders of the trial court denying them. Nor does he allege any facts other than that there is no oral or signed waiver of jury trial of record.

"Consequently the petition is entirely inadequate to show that the motions to vacate have proved ineffective to test the legality of his detention. Moreover, it appears from the copy of the judgment and commitment attached as an exhibit to the petition that the judgment and sentence was entered upon his plea of guilty. Thus the ground for relief asserted in the petition and allegedly presented in the motions to vacate is wholly frivolous.

"The petition for the writ of habeas corpus is dismissed.

"Dated: December 9, 1954.

"*/s/ LOUIS E. GOODMAN*

"*United States District Judge.*"

ARGUMENT.

This appeal is frivolous. It needs no citations of authority to establish that a waiver of jury trial is unnecessary on a plea of guilty. Furthermore, appellant may not apply for habeas corpus in the circumstances here. His remedy is under Section 2255 of Title 28 United States Code. The mere fact that a 2255 motion was denied and that denial affirmed on appeal is no showing that the remedy by motion is inadequate or ineffective to test the legality of his detention. *De Normand v. Swope* (C.A. 9, 1953), 207 F.2d 66; *Jones v. Squier* (C.A. 9, 1952), 195 F.2d 179; *Winhoven v. Swope* (C.A. 9, 1952), 195 F.2d 181; *Whiting v. Hunter* (C.A. 10, 1953), 204 F.2d 471; *Mills v. Hunter* (C.A. 10, 1953), 204 F.2d 468; *Madi-gan v. Wells* (C.A. 9, 1955), 224 F.2d 577.

Dated, San Francisco, California,

November 9, 1955.

Respectfully submitted,

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